No. 15,338

IN THE

United States Court of Appeals

For the Ninth Circuit

ALTHEA G. WILLIAMS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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COMMENT ON APPELLEE'S STATEMENT OF THE CASE.

Before commencing her rebuttal of appellee's brief, appellant feels impelled to complain vigorously concerning its "factual" content.

In its statement of the case, appellee quotes portions of an opinion of this Court, since disapproved by the U. S. Supreme Court and asks this Court quite unfairly to itself, to re-adopt its own disapproved language as the facts of this case!

Appellee's statement of the facts is merely its factual conclusions flowing from a legal theory since rejected by the Supreme Court.

The former opinion of this Court held erroneously that federal law and regulations (whether enforced or

not) determined the government's liability. This Court was in error when it then said:

> "The novel *status* of a soldier arising from this peculiar relationship with his government, was clearly pointed up by emphatic language of the court in *United States v. Standard Oil Co. of California,* 332 U. S. 301, 305, 306, 309, 310. That decision merely brought into sharp focus the controlling legal and constitutional factors underlying such a unique relationship. . . ." (R. 177).

(The said case held that this status was "derived from federal sources and governed by federal authority.") Continuing:

> "Congress did not lose sight of this obvious fact while considering the many problems wrapped up in the national defense program in connection with its surrender of immunity to suit under the Act. As we point out herein, one important problem was met and disposed of by a specific provision in the Act which carefully delimited the area of federal liability for a tortious act of (as here) a soldier, by providing that such liability would attach only when the act was committed while the soldier was 'acting in line of [military] duty.' This careful delineation provides a clear line of demarcation between Government liability for a soldier's torts and the area of general liability of a private employer for torts of his employees in classical 'master and servant' cases where the rule of respondeat superior is normally applied. . . ." (R. 177-178).

> ". . . we must (as we do in this case) hold that 'acting in line of duty' means *acting in line of military duty.* If Seabourn was not acting in line

> of *military duty* at the time he injured appellant, the rule of respondeat superior (as applied in orthodox 'master and servant' cases) loses its standardized force for that rule has been modified in the significant manner here noted." (R. 179).

By thus holding that the government could be liable under "federal law" only if Seabourn were performing some "duty" military in character, this Court made it unnecessary to state much of appellant's evidence in its opinion nor to consider its effect under respondeat superior. But the Supreme Court, by rejecting this theory and ordering the case to be reconsidered under principles of respondeat superior, clearly makes such evidence factually relevant to a proper determination of the case. That evidence, erroneously ignored in this Court's former statement of the facts, becomes all-important. It is therefore necessary now to consider its probative effect.

ARGUMENT.

I. THE EVIDENCE OF CUSTOM AND PRACTICE ON GUAM IS NOT, AS RESPONDENT CONTENDS, "MEAGER". RATHER, IT IS SUBSTANTIAL AND UNCONTRADICTED, AND IT PROVES (1) SEABOURN'S AUTHORITY TO OBTAIN POSSESSION OF THE VEHICLE FOR HIS INDIVIDUAL RECREATIONAL USE, AND (2) A WAIVER OR REPEAL OF ANY PROHIBITORY ARMY REGULATION.

Appellee contends that no "proper" officer authorized Seabourn's use of the vehicle, that "the pertinent Army Regulations forbade any practice of passing vehicles around and using them as Seabourn did here.

. . ., and his driving was therefore clearly unauthorized." (A.B. 16).*

In considering these contentions, the court should not lose sight of the fact that the evidence, by mandate of the Supreme Court, is to be considered in the light of the principle of respondeat superior, not some other theory based on federal law. Nor should the court lose sight of the fact that the only opinion of this Court which has dealt with a similar case and has withstood the scrutiny of the U. S. Supreme Court is *Murphey v. U. S.*, 179 Fed. 2d 743.

So, therefore, wherein is appellant's evidence on custom and practice "meager"? The evidence, quoted at length in the opening brief, pages 11 to 15, given by three witnesses, without contradiction, certainly qualifies as substantial evidence. It is axiomatic that the testimony of even one witness who is entitled to credit may be sufficient in a civil case to prove a fact, even if it is uncorroborated and contradicted. *Holder v. Key System,* 88 C.A. 2d 925. *Here, appellant's evidence is not even contradicted.* How much more testimony should appellant have produced from 6,000 miles away?

Appellee, however, contends that this Court and the court below found that no "responsible" official authorized Seabourn's use of the vehicle, referring again to the opinions of this Court and the District Court which were disapproved by the Supreme Court. (A.B. 16). As before noted, these opinions were based upon

*A.B. refers to appellee's brief.

an erroneous legal theory which necessarily caused this Court and the District Court to ignore appellant's evidence of custom and practice. Appellee's contention thus begs the question. The question now is whether such evidence proves that Seabourn's use was authorized by a responsible official. Appellant contends that it quite clearly does.

Appellant's evidence showed that the custom, practice and standard operating procedure had existed in Seabourn's Detachment for at least a year and three months before the accident. (R. 11). Appellant's evidence also showed that Seabourn's own commanding officer himself used this procedure. (R. 32). Thus appellee's assertion that no "proper" officer countenanced or knew about this practice (A.B. 16) is completely contrary to the evidence. Recall that although appellee was apprised (by way of pre-trial interrogatories) of appellant's claim that Lt. Werb knew of and authorized the custom and practice *there is no contra evidence. There is no evidence in the record, no testimony of Lt. Werb or his superiors, that the custom and practice did not prevail nor that Lt. Werb did not approve nor himself indulge therein.* The inference of knowledge and authorization is therefore inescapable.

> ". . . knowledge need not be directly proved. It, like any other fact, may be inferred from circumstantial evidence." *Gantner & Mattern Co. v. Hawkins,* 89 C. A. 2d 783, 786. "If it appears that the party has knowledge or information of such facts as are sufficient to put a prudent man upon inquiry and . . . he wholly neglects to make any

> inquiry, or, having begun it, fails to prosecute it in a reasonable manner, then also, the inference of actual notice is necessary and absolute." *Hawke v. California Realty Etc. Co.* 28 C.A. 377, 382.

And, who would have been the "proper" or "responsible" officer, other than Seabourn's commanding officer, Lt. Werb, to have authorized the custom and practice? Appellee names none, and certainly appellant, the injured third person, was not bound to search blindly through an elusive, distant and ever changing chain of command to fix responsibility. Her rights shouldn't be lost in the shuffle of "passing the buck."

As said heretofore, appellee again refers to alleged violations of Army Regulations, and, as a non sequitur, concludes therefrom that Seabourn's possession of the vehicle was "clearly unauthorized." Appellee thus again neglects to consider the long-established custom and practice in disregard of such regulations. This case is like those where the servant disregards ignored and unenforced company rules and, under respondeat superior, the employers have been held liable. As the court said in *Fry v. Southern Public Utilities Co.,* 111 S. E. 354, 358 (183 N. C. 281):

> "It has been held generally that if a rule is made for the safety of the servant or others, but its *customary violation* has continued so long that the master either knew of it, or could by the exercise of ordinary care have found it out, and acquiesced in it, *he is presumed to have consented to its repeal, or to have waived obedience to it.*" (Emphasis supplied.)

Appellee cites no authority contrary to this rule. Nor could it, since California law is in accord. Negatively speaking, it is true in California that the violation of a company rule does not preclude responsibility of the employer. *Field v. Sanders,* 29 Cal. 2d 834, 839. And, positively speaking, it is true, as this very Court held in *Murphey v. U. S.* supra, while applying California law, that where permission has been granted as a general custom to use an army vehicle for recreation, such practice fixes liability upon the government and renders groundless the trial court's findings that the soldier was not acting within the scope of his employment, even though in a particular case there is positive testimony of prohibitive orders.

In any event, it is odd indeed to find appellee continuing to argue that the alleged violation of an Army regulation, unless it were "incidental in means and methods" (A.B. 16), should relieve the government of liability. The U. S. Supreme Court mandate in this very case is directly to the contrary. The rights of injured third persons are to be governed by the principles of *respondeat superior,* not by the skill of some legal draftsman in the Pentagon, who might, by legal fiction and blind to actualities, so draft or construe administrative regulations as to defeat tort claims by injured third persons. Where authority to do an act is, *in fact, granted, this Court* has held in the *Murphey* case, and the Supreme Court has gone along with the California doctrine that the government thereby becomes liable.

II. MODERN CALIFORNIA LAW IMPOSES LIABILITY ON THE EMPLOYER UNDER THE FACTS OF THIS CASE.

With the exception of a completely distinguishable case, *Pacific Freight Lines v. U. S.*, 239 F. 2d 191, the most recent California authority cited by appellee dates from 1924—thirty-three years ago. No mention is made by appellee of cases like *Boynton v. McKales,* 139 C.A. 2d 777, cited by appellant, and dating from one year ago. Concepts change, and it is no longer true, as appellee contends (A.B. 8-9), that the employee at the time of the accident in order to impose liability must be engaged in "work" or in performance of "duties." It does not matter that Seabourn was not performing his duty as supply clerk or performing any other so-called "official duties." (A.B. 11.) Neither the soldier in *Murphey v. U.S.,* 179 Fed. 2d 743, nor the salesman in the *Boynton* case, supra, were performing "duties" nor conducting business at the time of their respective accidents.

The important fact which distinguishes the *Pacific Freight* case and the California cases cited by appellee is that in the case at bar, as in the *Murphey* and *Boynton* cases, the employee was authorized *for the benefit of the employer* to engage in recreational activities. Deviations in route, as in the *Pacific Freight* case, are not important. Here the scope of employment, by virtue of the authorization to use the vehicle for recreation, becomes broadened so as to include acts done pursuant to such authorization. The *Murphey* case, decided by this very Court, so holds. The *Boynton* case, decided by the California Court, holds even

more strongly. There the employee was not even expressly authorized to drive his own car from the party, yet the employer was held liable.

To condemn Seabourn's actions as a "drunken frolic" does not answer the question whether his acts were within the *scope* of his employment. The salesman in the *Boynton* case pleaded guilty to drunken driving. The soldier in the *Murphey* case had visited a saloon. Appellant does not contend, nor need she, as the court thought when it said in its former opinion, "that Seabourn was actually indulging in an authorized and permissible form of 'recreation' at the time he crashed his Army vehicle into appellant's car." (R. 179-180). Neither did the appellant in the *Murphey* case have to contend that the soldier was actually authorized to visit the bar, pick up his girl friends, and drive to the Indian Ceremonial. Neither did the respondent in the *Boynton* case have to contend that the salesman was actually authorized to become drunk and drive upon the California highways. Yet in each such case, the wrongful act was performed within the *scope* of employment so far as injured third persons were concerned. The wrongful acts were performed within the course of a series of acts of the agent which were authorized by the principal; and thus each met the test under respondeat superior. *Deevy v. Tassi,* 21 Cal. 2d 109, 125. In the case at bar and in the *Boynton* case, the "drunkenness on the part of the agent is an act of negligence for which his employer becomes liable," *Christian v. U. S.,* 184 F. 2d 523, 525 (6th Cir. 1950). It doesn't relieve of liability—it creates it!

Murphey v. U.S., 179 Fed. 2d 743, is dispositive of this case. It is the law of this circuit. It has been approved by the Supreme Court by virtue of its mandate in our case. The crucial holding is that the recreation and morale of a single soldier is government business, and that the scope of the single soldier's employment broadens to include recreational driving of Army vehicles, where such is authorized, as here, by issuance of a pass (Cf. Appellee's Brief FN 6) and checking out of the vehicle from the motor pool for that purpose. It certainly cannot be emaciated, as appellee would wish (A.B. 14), to become a case where the individual was under *orders* to transport organized groups of soldiers.

The *Murphey* case, along with the *Boyton* case, is directly contrary to the holdings of the foreign cases cited in appellee's brief FN 7. Both the *Murphey* and *Boynton* cases state the *Califorina* doctrine of respondeat superior which the Supreme Court directed must be followed in this case.

This Court need apply only its own decision in the *Murphey* case to satisfy not only the rule of *stare decisis* but indeed the order of the highest Court of the land, and thus most important of all, accomplish justice and give to this permanently injured plaintiff her due.

CONCLUSION.

Appellant respectfully submits that appellee has not met the issues presented in her opening brief. Rather, appellee has presented arguments which, because of their reliance on a disapproved opinion of this Court, necessarily become obsolete following the mandate of the Supreme Court. For all the reasons foregoing, therefore, appellant respectfully requests reversal of the judgment and remand on the issues of damages alone, with costs to appellant in any event.

Dated, San Francisco, California,
May 2, 1957.

Respectfully submitted,
HENRY C. CLAUSEN,
Attorney for Appellant.